Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

JAMES B. CURASI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES B. CURASI
Petitioner, Pro Se
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71986 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

31pp

QUESTIONS PRESENTED

1. Whether the Government can impose a "penalty" against an individual pursuant to 26 U.S.C. § 6672 without affording him notice of the basis for such penalty and an opportunity to respond?

2. Whether the Government can impose the subject assessments after the three year statute of limitations imposed by 26 U.S.C § 6501?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reasons for Granting the Writ	3
I. The Government's Imposition Of A Penalty Against Mr. Curasi Without Affording Him Notice And An Opportunity To Respond Violated The Due Process Clause Of The Federal Constitution.	4
II. The Government's Failure To Impose The Assessments Against Appellant Within Three Years Violated § 6501 Of The Internal Revenue Code.	6
Conclusion	8

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Continental Illinois Corporation v. Commissioner of Internal Revenue, 998 F.2d 513 (7th Cir. 1993) 7, 8

In re M. Frenville Company, 744 F.2d 332 (3rd Cir. 1984) 7

James v. City of St. Petersburg, 6 F.3d 1457 (11th Cir. 1993) 5

Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 6

Statutes Cited:

11 U.S.C. § 362 6

11 U.S.C. § 362(a) 7

26 U.S.C. § 6501 ..... i, 1, 3, 4, 6

26 U.S.C. § 6672 .....i, 1, 2, 3

28 U.S.C. § 1254(1) 1

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit Filed January 9, 1997 ..... 1a

Appendix B — Memorandum Decision of the United States District Court for the Middle District of Florida, Orlando Division Dated August 22, 1995 ..... 3a

Appendix C — Judgment of the United States District Court for the Middle District of Florida Dated August 23, 1995 ..... 15a

Appendix D — Per Curiam Opinion of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing Filed June 17, 1997 ..... 17a

Petitioner, James B. Curasi, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are unreported and are reproduced at 1a, 17a. The unreported opinions of the district court in this case are reproduced at 3a, 15a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code, 26 U.S.C., are set forth below:

26 U.S.C. § 6501:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return is filed.

26 U.S.C. § 6672:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax . . . shall . . . be liable to a penalty

> equal to the amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

STATEMENT OF THE CASE

James B. Curasi was an officer of Atlantic Gulf Airlines, Inc. and Air Illinois, Inc. during the period 1985-86. "Responsible person" *penalties* were assessed against Mr. Curasi based on unpaid employment taxes arising during this period pursuant to § 6672 of the Internal Revenue Code (26 U.S.C. § 6672). At trial, Mr. Curasi stipulated that he was a "responsible person" within the meaning of the statute, but contested the legality and the amount of the penalty.

The District Court for the Middle District of Florida, Judge Anne Conway presiding, concluded that the Government was entitled to judgment against Mr. Curasi in the amount of $234,477.00. Both Mr. Curasi and the Government appealed the judgment to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the district court's decision.

The facts relevant to this Writ are as follows:

1. The Government's assessments against Mr. Curasi are not for his taxes, but for the taxes of another person for which the Government is seeking to hold him personally liable in the form of a "penalty".

2. Mr. Curasi has always contested "the accuracy of the assessments and the amount of tax due."

3. Mr. Curasi did not have or have access to copies of the tax returns forming the basis for the "penalties" against him,

notwithstanding his repeated requests to secure same from the Government.

4. The Government conceded at trial it had never provided Mr. Curasi with copies of the tax returns forming the basis of the "penalties" against him.

5. The Government did not file the subject assessments against Curasi within the three year statute of limitations imposed by 26 U.S.C. § 6501.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ in order to resolve two important issues concerning an individual's rights in Internal Revenue Service cases.

First, with respect to cases brought under 26 U.S.C. § 6672 whereby the Internal Revenue Service is seeking to hold an individual liable for another persons's tax liability in the form of a "penalty", whether Due Process requires that the former be given notice of the case against him and an opportunity to respond. More specifically, with respect to the case presently before this Court, the courts below effectively held that such individual is not entitled to copies of those tax returns forming the basis of the "penalty" against him nor is he entitled to an opportunity to respond.

Secondly, this Court should restrict the Internal Revenue Service's ability to take inconsistent positions against a taxpayer with respect to the same assessments.

Previously, the Internal Revenue Service argued in Federal Bankruptcy Court that the automatic stay provisions of the Federal Bankruptcy Act did *not* prevent the Service from

imposing these assessments against Mr. Curasi. Now, in the courts below, the Service has reversed itself so that it can argue that these same stay provisions *did* prevent the Service from imposing these assessments, thus the three year statute of limitations imposed by 26 U.S.C. § 6501 was tolled during the period of stay.

This Court should rule that the Internal Revenue Service is precluded from taking such inconsistent positions with respect to the same assessments against the same taxpayer.

I.

THE GOVERNMENT'S IMPOSITION OF A PENALTY AGAINST MR. CURASI WITHOUT AFFORDING HIM NOTICE AND AN OPPORTUNITY TO RESPOND VIOLATED THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

Mr. Curasi has consistently taken the position in this case that the tax returns filed with the Internal Revenue Service forming the basis of the penalties against him were fraudulently filed and inaccurate, and without the ability to review copies of these returns and to respond to same, Mr. Curasi contends that he was denied Due Process under the Federal Constitution.

The Government concedes that it has never provided Mr. Curasi with copies of these returns, notwithstanding his repeated request for same. Mr. Curasi's position is best summarized by the district court's conclusion at the end of the trial when the Government made this concession:

> How's (Mr. Curasi) going to prove his case if the Government doesn't give him the documents that are exclusively within (its) control?

The district court's inquiry brings into focus the central legal issue involved in this case, *to wit*, whether the Government can impose a "penalty" against an individual without affording him notice of the basis for such penalty and an opportunity to respond? Specifically, with respect to the case presently before this Court, can the Internal Revenue Service impose a "penalty" against an individual based on another person's tax liability without first affording said individual copies of those documents forming the basis for such tax liability and an opportunity to respond to same? The Court of Appeals failed to rule on this issue presented in this case.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court held that:

> The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it.

Id. at 348.

Further, the Court of Appeals for the Eleventh Circuit in the case of *James v. City of St. Petersburg*, 6 F.3d 1457 (11th Cir. 1993) found that the Government must give "notice reasonably calculated" to give an individual notice of the case against him. *Id.* at 1463.

The record in the case presently before this Court shows that the Government conceded that it had never provided Mr. Curasi with copies of the tax returns forming the basis for the penalties against him or an opportunity to respond to same. Without copies of these tax returns, Mr. Curasi was never given "notice of the case against him and an opportunity to meet it." *Mathews*, at 348. As inferred by the district court, it would thus

be impossible for Mr. Curasi to prove that the returns were inaccurate or fraudulently filed.

Therefore, by allowing the Internal Revenue Service to impose a penalty against Mr. Curasi for another person's tax liability without affording him notice and an opportunity to respond, the decision of the Court of Appeals is contrary to this Court's decision in the *Mathews* case.

II.

THE GOVERNMENT'S FAILURE TO IMPOSE THE ASSESSMENTS AGAINST APPELLANT WITHIN THREE YEARS VIOLATED § 6501 OF THE INTERNAL REVENUE CODE.

Section 6501 of the Internal Revenue Code provides, in relevant part, that:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return is filed.

26 U.S.C. § 6501.

The fact that the assessments against Mr. Curasi were not made within the three year statute of limitations is not in dispute in this case. The Government, however, contends that it was barred from imposing these assessments against Mr. Curasi during his reorganization case in Federal Bankruptcy Court pursuant to the automatic stay provisions of Bankruptcy Code (11 U.S.C. § 362), and therefore the three year statute of limitations was tolled.

This argument must fall as a matter of law for two reasons:

First, the automatic stay provisions of the Bankruptcy Code are *not applicable* to post-petition taxes (11 U.S.C. § 362(a)). *See In re M. Frenville Company*, 744 F.2d 332, 335 (3rd Cir. 1984). It is not in dispute that the taxes at issue herein are *post-petition*.

Secondly, even assuming *arguendo* that the automatic stay provisions did stay the subject assessments, the Government is estopped from arguing this position in this case because it prevailed in arguing to the previous federal court that:

> The automatic stay does not prohibit assessment of post-petition withholding or FICA taxes.

It is well settled that the Government is estopped from taking such inconsistent positions with respect to the same issue. For example, in the case of *Continental Illinois Corporation v. Commissioner of Internal Revenue*, 998 F.2d 513 (7th Cir. 1993), the Seventh Circuit precluded the IRS from taking similar inconsistent positions and held that:

> A party can argue inconsistent positions in the alternative, but once it has sold one to the court, it cannot turn around and repudiate it in order to have a second victory which is what the IRS is seeking here.

Id. at 518.

Previously, the Government argued to the Federal Bankruptcy Court that the automatic stay provisions of the Bankruptcy Code did *not* prevent the IRS from imposing these

assessments. Consequently that court refused to make a determination as to the legality of these taxes. In this Court, the Government is now seeking a second victory by arguing that these same automatic stay provisions of the Bankruptcy Act *did* prevent the Government from imposing these assessments, and therefore the assessments were timely made. The Government is estopped from taking such inconsistent positions as a matter of law pursuant to the doctrine set forth in the *Continental* case.

Thus, the Eleventh Circuit's decision in this case not only allows the automatic stay provisions of the Federal Bankruptcy Act to apply to post-petition taxes, but it also allows the Government to take inconsistent positions with respect to the same issue with impunity. This is clearly contrary to established federal law.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 9, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3176
Non-Argument Calendar

D. C. Docket No. 92-776-CIV-ORL-22

JAMES B. CURASI,

Plaintiff-Counter-Defendant-
Appellant – Cross-Appellee,

versus

UNITED STATES OF AMERICA

Defendant-Counter-Claimant,
Appellee – Cross-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(January 9, 1997)

Before EDMONDSON, DUBINA and BARKETT, Circuit Judges.

Appendix A

PER CURIAM:

James Curasi appeals the court's finding for the United States in his suit to recover tax penalties paid and to abate remaining tax penalties, 26 U.S.C. §6672. The government cross-appeals the court's calculation of interest due on the tax penalties owing. About Griffen's testimony, Curasi waived the issue by failing to object, and we see no plain error. Because Curasi did not show that the assessments were incorrect, the district court did not clearly err, and we affirm. Because the government failed to raise below the issue of pre-judgment interest, we affirm the issue on cross-appeal as well.

AFFIRMED.

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AUGUST 22, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 92-776-CIV-ORL-22

JAMES B. CURASI,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION

I. INTRODUCTION

This case was tried before the Court, without a jury, on June 5 and 6, 1995. Upon consideration of the parties' evidence, arguments and legal memoranda, the Court issues this memorandum decision.

II. PROCEDURAL BACKGROUND

The plaintiff, James B. Curasi, commenced this action "to recover an unstated amount of taxes paid in partial satisfaction of assessments made pursuant to Section 6672 of the Internal Revenue Code of 1986 (26 U.S.C.)." Pretrial Stipulation (Dkt.

63) at 2. The United States of America ("the Government") counterclaimed for the unpaid balance remaining on the assessments.

At trial, the parties agreed to submit the entire case to the Court for decision, and waived trial by jury. Transcript of Proceedings (Dkt. 78) ("TR. __") at 10. Curasi further stipulated that he was a responsible person, and that his failure to submit the subject taxes was willful, within the meaning of 26 U.S.C. § 6672. TR. 4-8. Based on that stipulation, the parties agreed that the only fact issue remaining for determination by the Court was the accuracy of the assessments and the amount of taxes due. TR. 8-9.[1] The Court took evidence on that fact issue and, at the conclusion of trial, directed the parties to submit post-trial briefs on the legal issues of the case.

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1. In the Pretrial Stipulation, Curasi framed the "accuracy" issue as follows: "5. Whether the tax returns underlying the assessments are not accurate, have been altered and/or forged, were not filed by authorized officers and do not represent the correct liability." Dkt. 63 at 11. At trial, Curasi referred to "item number five in our pre-trial stipulation" as representing the only fact issue remaining for trial. TR. 8-9. However, upon further inquiry by the Court, Curasi made clear that the only remaining fact issue was whether the amounts of the assessments were accurate. TR. 9. Accordingly, no other fact questions remain for determination by the Court. Despite this fact, in his post-trial brief, Curasi stated that the following fact issues remain for determination at trial: "whether the tax returns forming the basis for the assessments against the Plaintiff accurately represented the amount of tax liability, whether said returns had been altered and/or forged, and whether or not said returns were filed by authorized officers." Dkt. 82 at 1-2. Curasi's inclusion of the last two issues is erroneous. In any event, Curasi did not prove at trial that the underlying tax returns had been altered and/or forged, or were not filed by authorized officers.

Appendix B

III. ASSESSMENTS AT ISSUE

Prior to preparation of the parties' Pretrial Stipulation, the Government's counterclaim encompassed the unpaid employment tax liability of Air Illinois, Inc., and the unpaid employment and excise tax liabilities of Atlantic Gulf Airlines, Inc. However, the Court ruled at the inception of trial that the Government had failed to preserve its excise tax claim in the Pretrial Stipulation, and that Curasi would be unduly prejudiced by resurrection of that claim at trial. By virtue of the Government's waiver, only the employment tax liabilities of the two corporations are at issue.[2]

The relevant tax periods for Air Illinois are the third and fourth quarters of 1985. The pertinent tax periods for Atlantic Gulf are the third and fourth quarters of 1985, and the first three quarters of 1986.

IV. BURDEN OF PROOF

A plaintiff asserting a tax refund claim "bears the burden of proving both the excessiveness of the assessment and the correct amount of any refund to which he is entitled." *Carson v. United States*, 560 F.2d 693, 696 (5th Cir. 1977). If the Government attempts to collect a tax by way of a counterclaim, "the taxpayer bears only the burden of proving the assessment erroneous." *Id.* If the taxpayer succeeds, the burden shifts to the Government to prove the correct amount of any taxes owed. *Id.*

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2. The Government has filed a motion to dismiss the excise tax claim without prejudice. Final disposition of the excise tax claim will be made by separate order addressing the Government's motion.

Appendix B

V. ANALYSIS

A. Curasi's Refund Claim

1. Atlantic Gulf

Curasi admitted at trial that he did not file an administrative claim for refund with respect to his assessed liabilities deriving from Atlantic Gulf. TR. 82.[3] The filing of such a claim is a condition precedent to maintenance of a civil action for refund. 26 U.S.C. § 7422(a). Accordingly, Curasi's claim for refund relating to Atlantic Gulf is procedurally barred.[4]

2. Air Illinois

Government's Exhibit 1[5] reflects that on August 23, 1989, Curasi was assessed $72,000.16 as a civil penalty for unpaid

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3. In his response to the Government's post-trial brief, Curasi stated that (1) the IRS did not issue a separate notice of deficiency for the liability based on Atlantic Gulf taxes, and (2) Curasi's "Form 843 claim for refund does not refer to either Air Illinois or Atlantic Gulf taxes, but to all "civil penalties" against [Curasi], which includes *both* Atlantic Gulf Airlines and Air Illinois, Inc." Dkt. 85 at 2. However, these matters were not placed in evidence at trial. Accordingly, the Court cannot consider them.

4. Even if this refund claim were not procedurally barred, Curasi failed to meet his burden at trial of proving that the Atlantic Gulf assessments were erroneous, and that he was entitled to a refund, much less a refund in any particular amount.

5. This exhibit is admissible pursuant to Rules 902(1) and 803(8) of the Federal Rules of Evidence. Even if it were not, the testimony of Revenue Officer Griffen was sufficient to establish the accuracy and amount of the assessment.

employment taxes of Air Illinois. This information was confirmed by Revenue Officer Gary Griffen. TR. 217.[6] Moreover, Griffen broke this penalty down by calendar quarters: $33,932.47 for the third quarter of 1985, and $38,067.69 for the fourth quarter of 1985. TR. 216.

Curasi admitted at trial that he did not have any evidence that payments had been made to reduce this tax liability of Air Illinois, and explained that he "was not part of [the] payment plan" for Air Illinois. TR. 64-65. Accordingly, Curasi failed to prove that the assessment was erroneous. He also failed to show that he was entitled to a refund, let alone a refund in any particular amount.

Curasi maintains that he has been frustrated in determining the amount of taxes actually owed by the Government's failure to furnish him with the original returns filed by Air Illinois and Atlantic Gulf. At trial, Curasi complained that he had previously asked the Government to produce the two corporation's original tax returns, but that the Government had only given him unsigned copies. Counsel for the Government responded that although the Government had not produced the original returns, Curasi had not asked for them. The Government maintained that it had produced the returns requested by Curasi, that is, the returns upon which the assessments were based. The Court initially was concerned about this matter, but those concerns have been allayed upon examination of Curasi's discovery request.

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6. According to the trial transcript, Griffen testified that the total was "$72,016." TR. 217. This appears to be a transcription error, undoubtedly resulting from the aural similarity of "$72,016." to the correct figure, "$72,000.16."

Appendix B

In his First Request for Production of Documents, served April 27, 1993, Curasi asked the Government to produce "[a]ll documents[,] including but not limited to tax returns, used as a basis for the assessments against" Curasi. As framed, this request does not expressly ask for the original tax returns; instead, it asks for tax returns used as a basis for the assessments. It appears that the Government fairly met that request by furnishing Curasi with the returns the collection officer used to prepare the assessments. Further, with one exception, it appears that the assessments were based on copies of returns that Curasi himself furnished to Revenue Officer Griffen.[7] Accordingly, the Government did nothing wrong in furnishing Curasi with the unsigned returns upon which the assessments were based.

Based on the foregoing, the Court determines that Curasi has failed to prove that he is owed a refund on the Air Illinois assessment.

B. Government's Counterclaim

1. Atlantic Gulf

Government Exhibit 3[8] reflects that on February 22, 1989,

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7. Griffen testified that, at his request, Curasi furnished him in November 1986 with copies of all returns that had been filed. Atlantic Gulf had not yet filed a return for the third quarter of 1986, so Griffen gave Curasi a deadline for doing so. When Curasi failed to meet that deadline, Griffen contacted the bookkeeper of Atlantic Gulf. She advised Griffen that the liability for the third quarter of 1986 was very similar to the liability for the prior quarter. Since Griffen had a copy of the second quarter return, he prepared a third quarter return for Atlantic Gulf based on the company's second quarter liability. TR. 197-201.

8. *See*, n. 5, *supra*.

Appendix B

Curasi was assessed $161,685.18 as a civil penalty for unpaid employment taxes of Atlantic Gulf. Revenue Officer Griffen confirmed this total and broke down the penalty by calendar quarters: $2,393.58 and $10,386.57 for, respectively, the third and fourth quarters of 1995, and $48,338.25, $50,283.39, and $50,283.39 for, respectively, the first, second and third quarters of 1986. TR. 214-15.

Curasi testified that Atlantic Gulf made many payments, almost always in the amount of $700, to its bank and designated the payments for application towards the trust fund portion of the company's employment taxes. TR. 37. He further testified that the bank issued the company a receipt for those payments, which read: "This certifies that funds in the amount shown have been received from the employer named covering federal income tax withheld from wages or FICA taxes or both to be transmitted or credited to the Federal Reserve Bank of Atlanta, as fiscal agent of the United States, pursuant to the provisions of the Treasury Department Circular Number 848." TR. 38. Curasi claims that these payments were misapplied by the Government to other tax liabilities and calendar quarters.

In support of this argument, Curasi introduced Plaintiff's Exhibit 1, which is a transcript reflecting tax payments made by Atlantic Gulf. This document, generated by the Government, shows a number of $700 payments. Curasi testified that the document reflects that, "almost without exception", the $700 payments were not applied to trust fund employee taxes for the current quarter, but instead were applied to other taxes in other quarters. TR. 39.

The Court rejects Curasi's argument that the Government misapplied Atlantic Gulf's payments. Plaintiff's Exhibit 1

reflects that, with one exception,[9] each $700 payment is linked to a "micro serial number" which appears to the right of the payment column. Revenue Officer Jose Ramos testified that this "micronumber" is derived from a federal tax deposit coupon submitted by the taxpayer along with the payment. TR. 124-25. The tax coupon designates to what specific tax and period a particular payment is to be applied by the Government. TR. 120; *see also*, TR. 227-28. Ramos testified that all of the $700 payments in Plaintiff's Exhibit 1 which Curasi specifically referenced in his testimony, were applied pursuant to tax coupon directions. TR. 124-25. This evidence convinces the Court that the Government applied the payments in the manner in which Atlantic Gulf designated them.

The Court further determines that the deposit slips, standing alone, do not prove that Atlantic Gulf advised the IRS to apply payments in a manner contrary to the designations in the tax deposit coupons. There is no indication that the IRS was a party to any payment designation arrangement between the bank and Atlantic Gulf. Further, there is no evidence that the IRS ever received these seemingly contrary "designations." Indeed, the fact that the payments were applied in accordance with tax coupons suggests that the IRS did not receive any contrary instructions.

Based on this evidence, the Court determines that Curasi has failed to meet his burden of demonstrating that the Atlantic

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9. The lone exception is a $700 payment shown on page 25 of Plaintiff's Exhibit 1. Several numbers appear beside the payment figure, along with the notation "interest to date." There was no testimony at trial about this particular payment, and the Court cannot determine whether or not it was properly applied, or even how it was applied. Suffice it to say that Curasi has not shown that this payment was in fact misapplied.

Gulf assessment was erroneous. The evidence establishes that as of May 5, 1995, Curasi owed $161,685.18 in penalties for unpaid employment taxes of Atlantic Gulf.[10]

2. Air Illinois

Based on the evidence discussed in section V.A.2 of this memorandum decision, the Court determines that Curasi has not met his burden of proving that the Government's Air Illinois assessment was erroneous. The evidence establishes that as of May 5, 1995, Curasi owed the Government $72,000.16 in penalties and $792.32 in interest ($1,257.34 less $465.02 payment) for unpaid employment taxes of Air Illinois.

C. Limitations

Curasi maintains that the assessments are illegal for the reason that they were not made within the three year period prescribed by 26 U.S.C. § 6501(a). The Government maintains that under 26 U.S.C. § 6503(h), the limitations period for assessments was tolled during the pendency of Curasi's

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10. The Government has failed to prove the amount of interest to which it is entitled on the Atlantic Gulf penalty. Government Exhibit 3 reflects that the Government assessed $6,067.49 in interest against Curasi on May 1, 1989. However, it appears that this interest may relate to both excise taxes and employment taxes. As previously noted, the Government failed to preserve its claims for unpaid excise taxes in the Pretrial Stipulation. At this juncture, the Court cannot ascertain the amount of interest attributable solely to employment taxes. In its post-trial brief, the Government has not attempted to separate the interest attributable to excise taxes from that attributable to employment taxes. *See*, Government's Post-Trial Memorandum (Dkt. 83), Appendix 1 at n.17. As a result, the Government will not be awarded interest on the penalty arising from Atlantic Gulf's unpaid employment taxes.

bankruptcy proceeding up to the date of confirmation, and for 60 days thereafter.

This question turns on whether assessment of the subject taxes was barred by the automatic bankruptcy stay. The Court concludes that 11 U.S.C. § 362 barred the Government from making the assessments at issue, at least up to the time that Curasi's bankruptcy plan was confirmed.[11] Pursuant to § 6503(h), the three year limitations period was tolled at least until plan confirmation.[12] By operation of that statute, the Government's assessments, made in February (Atlantic Gulf) and August (Air Illinois) 1989, were timely. Accordingly, the Court determines that the Government's counterclaim is not time-barred.

The Court rejects Curasi's related argument that the counterclaim is barred because the Government took a different position in Curasi's bankruptcy case than it has in this case, concerning whether the automatic bankruptcy stay precluded it

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11. The Court recognizes that there is a split of authority concerning whether the automatic bankruptcy stay continues to bar post-petition claims after plan confirmation (and until discharge) in a Chapter 13 bankruptcy case. *Compare*, *In re Dickey*, 64 B.R. 3 (Bankr. E.D. Va. 1985), with *In re Clark*, 71 B.R. 747 (Bankr. E.D. Pa. 1987). In the instant case, the assessments were made after plan confirmation, but before discharge. If the automatic bankruptcy stay survives confirmation in a Chapter 13 case, arguably the assessments violated the automatic stay. However, Curasi did not preserve in the Pretrial Stipulation any argument that the assessments were illegal because they violated the automatic stay. Accordingly, he has waived any such argument.

12. The Court need not decide whether tolling first commenced on the day Curasi filed his bankruptcy petition, or, instead, on the day the first tax return (on which an assessment was based) was due to be filed. Using either date, the assessments were timely.

from making the assessments while the bankruptcy proceeding was pending. Upon first inspection, Curasi's argument is appealing. However, it does not withstand close scrutiny.

In its Opposition of the United States to Debtor's Motion for Determination of Tax Liability (attached to Dkt. 82), served December 29, 1989 in Curasi's bankruptcy case, the Government stated: "[T]he automatic stay does not prohibit assessment of post-petition withholding and FICA taxes." In its Post-Trial Memorandum (Dkt. 83) in this case, the Government stated: "Under former Section 362 of the Bankruptcy Code, the automatic stay prohibited assessment during the pendency of a bankruptcy case." Read in isolation, these statements appear to be diametrically opposed. However, when considered in context, the statements are reconcilable.

Although the Government's bankruptcy memorandum is by no means a model of clarity, careful inspection of the document discloses that the Government in substance contended that the automatic stay lifted upon confirmation of the bankruptcy plan because estate property at that time revested in Curasi, and that the 1989 assessments were timely by operation of § 6503. This actually is consistent with the Government's overall position in the instant case. *See* Government's Post-Trial Memorandum (Dkt. 83) at 10-11 and nn. 9 & 10.

D. Other Issues

The Court rejects without discussion Curasi's estoppel and laches arguments. The Court similarly rejects Curasi's contentions that the Government denied him constitutional due process, that 26 U.S.C. § 6672 violates the due process clause of the United States Constitution, and that the Government

violated 26 U.S.C. § 6203 by failing to provide Curasi with copies of the assessments and the documents underlying the assessments.

VI. CONCLUSION

Based on the foregoing, the Court determines that James B. Curasi shall take nothing on his claim against the United States, and that the United States shall recover from James B. Curasi the sum of $234,477.66, with post-judgment interest thereon at the rate calculated in accordance with 28 U.S.C. § 1961, and its costs of action. The Clerk is directed to enter judgment accordingly.

DONE AND ORDERED in Chambers in Orlando, Florida, this 22nd day of August, 1995.

s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Plaintiff
Counsel of Record

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED AUGUST 23, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NUMBER: 92-776-CIV-ORL-22

JAMES B. CURASI

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff, JAMBS B. CURASI, shall take nothing on his claim against the defendant, UNITED STATES OF AMERICA, and that the UNITED STATES shall recover from JAMES B. CURASI the sum of $234,477.66, with post-judgment interest of 5.89% per annum from the date of this judgment, and its costs of action.

Copies to:

James B. Curasi
Counsel of Record

Appendix C

AUG 23 1995
Date

s/ DAVID L. EDWARDS
Clerk

s/ illegible
(By) Deputy Clerk

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 17, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-3176

JAMES B. CURASI,

Plaintiff-Counter-Defendant-
Appellant-Cross-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Counter-Claimant,
Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE